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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUN EXPLORATION AND PRODUCTION COMPANY, *et al.*,

Petitioners,

v.

JAMES R. CONNER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

In response to the briefs in opposition filed by Mr. Conner and the Department of Justice in this proceeding, petitioners respectfully submit the following reply:

First, contrary to the suggestions made by respondent Conner (Conner Brief at 10-13), the Departments of the Interior and Agriculture have consistently interpreted and implemented the National Environmental Policy Act and the Endangered Species Act, insofar as applicable to the federal oil and gas program, since those statutes were enacted nearly two decades ago.[1] Those Departments have prepared — and are preparing — NEPA and ESA environmental review

[1] The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982) ("NEPA"), was enacted effective January 1, 1970. The Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982) ("ESA"), was enacted effective December 28, 1973.

documents on the *proposals* before them as required by statute.[2] That is, rather than preparing environmental review documents on known leasing proposals *and* subsequent, uncertain exploration and development scenarios that may never arise as required by *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988) ("Conner"),[3] those Departments prepare environmental review documents on leasing, exploration, and development activities when concrete proposals are made. Through that process they have completed the required NEPA and ESA studies necessary to support the issuance of nearly 90,000 oil and gas leases that remain outstanding, including over 7,000 leases in fiscal year 1987, for scattered and diverse tracts peppered across 40 states. Petition at 2.[4]

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[2] NEPA, for instance, requires federal agencies to prepare "detailed statements" "on *proposals* for legislation and other major federal actions significantly affecting the quality of the human environment. . . . " 42 U.S.C. § 4332 (1982) (emphasis added).

[3] It is undisputed (i) that post-leasing exploration or development proposals are "an extremely tentative possibility at best . . . because exploration activities are conducted on only about one of ten federal leases issued and development activities are conducted on only about one of ten of those leases upon which exploration activities have been approved and completed" and (ii) that "[w]hen BLM [Bureau of Land Management] is considering a new leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area." *Park County Resources Council* v. *United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), as reproduced in Appendix D to the Petition ("Park County").

[4] Respondent Conner also seriously misrepresents the record. Conner Brief at 10-13. The administrative record on which the Departments acted in this case not only contained environmental assessments that collectively exceed 225 pages, but also thousands of pages of planning documents for both the national forests in question and management areas within those forests. All studies contained in the administrative record that was certified will be forwarded to the Court if certiorari is granted. In the meantime, petitioners are forwarding to the Clerk the environmental assessments prepared in this case.

Second, the briefs in opposition are eloquent in their silence. Respondents never address themselves to the landmark decisions of this Court — principally *Kleppe* v. *Sierra Club*, 427 U.S. 390, 96 S. Ct. 2718 (1976); *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 102 S. Ct. 197 (1981); and *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 103 S. Ct. 1556 (1983) — that support the administrative practice long pursued by the Departments of the Interior and Agriculture, that are dispositive of the issues raised in *Conner*, and that provide the grounds why the Ninth Circuit erred in that case, as the Department of Justice expressly acknowledges that it did. Department's Brief at 9, 14. Moreover, respondents nowhere question that Congress ratified that long-standing administrative practice, both by acquiescing in that construction for nearly twenty years and by recently rejecting an amendment to the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (Supp. V 1987), that would have required comprehensive consideration of not only leasing proposals, but also exploration and development scenarios, before onshore oil and gas leases could be issued. Petition at 27-28.

Third, respondents claim that decisions of the Ninth, Tenth, and District of Columbia Circuits — principally *Conner; Park County; Sierra Club* v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) ("Peterson"); and *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 676 (D.C. Cir. 1982) ("Cabinet Mountains") — do not "clearly" or "squarely" conflict (Department's Brief at 9, 16) because, for example, (i) the *Park County* "court did not rule that issuance of onshore oil and gas leases of national forest lands *never* requires preparation of an EIS [environmental impact statement . . .][n]or, conversely [do *Conner* and *Peterson*] rest[ ] on the absolutist position that the issuance of an oil and gas lease for national forest lands *always* requires an EIS" and (ii) the decisions "reflect the very different facts present in the cases." *See, e.g.*, Department's Brief at 10

(emphasis added).[5] It is true that neither *Conner* nor *Park County* is "absolute." It is also true that, although the *Conner* and *Park County* cases involve remarkably similar lands within national forests that are contiguous to Yellowstone National Park, every NEPA and ESA challenge brought to a federal oil and gas program decision will present somewhat different facts.[6] Department's Brief at 10. Both points, however, are wide of the mark. The critical points are that (i) three federal courts of appeals have applied widely disparate legal analyses in the face of identical legal questions of substantial import, (ii) those courts have rendered conflicting decisions whether the Departments of the Interior and Agriculture are required to prepare NEPA and ESA environmental review documents that address not only the concrete leasing proposal before them, but also subsequent, uncertain exploration

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[5] Petitioners note that respondents' arguments on this point differ substantially. For instance, rather than contend, as does the Department of Justice, that the *Conner* and *Park County* decisions do not conflict because neither holds categorically that environmental impact statements must always or need never be prepared for all leasing proposals, respondent Conner acknowledges that the *Conner* and *Park County* courts "identifi[ed] completely different proposals for action." Conner Brief at 16. For the reasons articulated above, the "identification" of the "proposal" before the Departments is perhaps the most critical legal question raised by this case.

[6] *Park County* focused on lands within the Shoshone National Forest which, like the Gallatin National Forest, borders on Yellowstone National Park. Both the Shoshone and Gallatin National Forests contain "high mountain peaks," "broad river valleys," and "widely known trout waters." Conner Brief at 3-4. Moreover, the specific lands that were contested in both *Conner* and *Park County* had never "been designated as wilderness, wilderness study, park, or other restricted use lands." Department's Brief at 8. Most important, in both *Park County* and *Conner* the Departments have exercised their discretion by refusing to issue oil and gas leases for pristine areas within the national forests — they have leased only multiple use lands where, in their expert judgment, the broader public interest will be served thereby.

and development scenarios that may never arise,[7] and (iii) those decisions will have a great bearing on when complete environmental impact statements and biological opinions must be prepared and the proper scope of all environmental review documents accompanying federal oil and gas program decisions.[8] Petitioners respectfully submit that that is precisely the type of conflict that this Court should reconcile in its institutional role as supervisor of the judicial system.[9]

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[7] Respondents seek to distinguish *Cabinet Mountains* because that case involved "hard rock minerals" rather than oil and gas activities. Conner Brief at 23; Department's Brief at 17. Those attempts fail. In *Cabinet Mountains* the District of Columbia Circuit affirmed a Department of Agriculture decision to approve the proposal before it based on NEPA and ESA environmental review documents that addressed only that proposal and to conduct additional NEPA and ESA studies when subsequent, concrete proposals were made, notwithstanding that once a discovery of a valuable mineral deposit is made, the federal government cannot absolutely prevent development of a mining claim. Petition at 16-17.

[8] Petitioners note that although the Department of the Interior routinely issues approximately 7,000 oil and gas leases each year for scattered tracts that cannot exceed 2,560 acres, that entire Department, not merely the oil and gas division of the Bureau of Land Management, routinely prepares only about 100 draft *and* final environmental impact statements each year. Petition at 4-5; 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987).

[9] Petitioners also note that in other cases the Department of Justice has recommended that certiorari be granted when the conflict between courts of appeals is less severe than in this case. In *Federal Labor Relations Authority* v. *Aberdeen Proving Ground*, No. 86-1715, for instance, the Department sought review notwithstanding (i) that it was uncertain whether the courts of appeals would have decided the cases differently in light of their different facts and (ii) that the decisions involved construction of two different regulations because the regulations had been amended after the first but before the second decision was rendered. Department of Justice Brief in Response in *Federal Labor*, Argument and Introduction at paragraph 3. This Court granted certiorari and subsequently rendered a decision in that proceeding. ____ U.S. ____, 108 S. Ct. 1261 (1988).

Fourth, respondents sing a siren song to an overworked court — they suggest that the Court can defer review of *Conner* in the public interest. *See, e.g.*, Department's Brief at 13, 14, 18. Petitioners, like the Western Governors who have filed an amicus brief requesting the Court to grant certiorari in this proceeding, respectfully disagree. To delay review of this case is manifestly not in the public interest. Uncertainty occasioned by *Conner* will result in a substantial decrease in the approximately 7,000 federal leases that historically have been issued each year. Petition at 2.[10] The issuance of fewer oil and gas leases will necessarily result in reduced oil and gas activities on and production from federal lands. Petition at 26.[11] Federal, state, and local revenues derived from oil and gas activities will correspondingly decline, an important consequence given widely recognized budgetary pressures presently faced by governments at all levels. Petition at 26. Federal lessees' interests will be adversely affected. And the critical legal issues presented are clearly joined and will not ripen with further delay. Simply put, the difficulties associated with delay far outweigh the advantages, if any, that may arise therefrom.

Fifth, the Department of Justice's sensitivities in this case are understandable. Because the Department of Agriculture here did not act on any leasing proposal for years and until hundreds of proposals had been made, the Department of Justice must acknowledge that action was delayed for nearly a decade and that leases were issued in such a manner that discrete leasing decisions involving multiple use lands

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[10] Evidence of the reduction in federal oil and gas leasing is already manifesting itself. *See, e.g.*, Western Governors' Amicus Curiae Brief at 5-6.

[11] Those reductions could not occur at a worse time. Domestic oil production has "dropped . . . [to] the lowest level in 24 years" at a time of "swelling consumer demand for energy." *U.S. Oil Production Drops to Lowest Level in 24 Years — Analysts Warn of Threat to Energy Security*, Washington Post, January 19, 1989, at A1.

could be characterized by leasing opponents as a single decision to open pristine lands to oil and gas activities. Department's Brief at 3, 5. Neither the Department of Agriculture's delay nor the characterization — a characterization which is manifestly inaccurate — should guide the Court's decision on a petition framing legal issues of such moment. Moreover, the undisputed facts here are (i) that, on the basis of an extensive record that included environmental assessments exceeding 225 pages, the Department authorized issuance of leases on only a relatively small portion of lands within the forests,[12] (ii) that even on these relatively nonpristine, multiple use lands the Departments imposed lease stipulations that entirely prevented or severely restricted any activities, (iii) that, in the exercise of their expertise, the Departments concluded that the proposals would not significantly affect the quality of the human environment, and (iv) that, without any recognition of the deference it must pay expert agencies in such matters, the Ninth Circuit rejected that conclusion based on its own determination — a determination that is nowhere supported by the record — that oil and gas activities are "highly intrusive."[13] Petitioners respectfully submit that the Court should grant certiorari and render a decision whether the historical, tiered environmental review procedures employed by the Departments of the Interior and Agriculture do or do not stand legal muster.

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[12] Respondent Conner, for instance, recognizes that the Department of Agriculture recommended that less than one-fourth of the 2,364,000 acres within the Flathead National Forest be subject to oil and gas leasing. Conner Brief at 2-3.

[13] *Conner*, Petition at A17-A18; Department's Brief at 12, n. 9. ("The court of appeals never identified the nature of the significant environmental impacts it presumed will occur; nor did the court otherwise explain why the leasing would have significant environmental impacts, notwithstanding the lease stipulations.")

CONCLUSION

For the reasons articulated in the petition and this reply, petitioners pray the Court to grant certiorari in this case.

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